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Supreme Court of the United States

October Term, 1976

No. 76-125

AMERICAN ELECTRO-COATINGS, INC.,
Petitioner,

vs.

RANSBURG CORPORATION, ELECTRO PAINTERS, INCORPORATED, GF BUSINESS EQUIPMENT, INC., THE GENERAL ELECTRIC COMPANY, and PARKWOOD LAMINATES, INC.,
Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Erroneous Premise of Respondent's Opposition

Respondent wholly evades the questions of substantial public importance presented in this petition, basically, (i) the evisceration in the courts below of the public policy with respect to unmuzzling patent licensees during a challenge of the licensed patents—as announced in *Lear v. Adkins,* 395 U.S. 653, 670-71 (1969) and restated in *Blonder-Tongue Labs. v. University Foundation,* 402 U.S. 313, 345-46 (1971)—and (ii) the concordant statutory public policy and purpose of 15 U.S.C. 15 to encourage challenges by persons injured in their business by agreements and practices in contravention of the anti-trust laws—as announced in *Mechanical Contractors v. Christensen,* 352

F.2d 817, 821 (10th Cir., 1965) and *Klor's Inc. v. Broadway-Hale Stores*, 255 F.2d 214, 217 (9th Cir., 1958) *rev'd on other grounds*, 357 U.S. 207.

In support of the avoidance by the Court of Appeals below and, thus, tacit condonement of the District Court's action, respondent now contends, as a premise, that

> "[P]etitioner filed its notice of appeal [to the appellate court below] 57 days after the original District Court decision from which petitioner purported to appeal, some 27 days later than the 30-day time period allowed for filing a notice of appeal under Rule 4(a) of the Federal Rules of Appellate Procedure. * * * [T]he Court of Appeals was bound to dismiss this appeal, and petitioner could not extend or toll this 30-day period by having filed in the District Court a motion for reconsideration which was overruled.[1] *Stiller v. Squeez-A-Purse Corp.*, 251 F.2d 561, 563 (6th Cir., 1958); see *Sonnenblick-Goldman Corp. v. Norwalk*, 420 F.2d 858 (3rd Cir., 1970); 9 MOORE'S FEDERAL PRACTICE, ¶ 204.12[1]." (Resp. Br. p. 6).

The respondent's cited decisions are inapposite and the text, MOORE'S FEDERAL PRACTICE, flatly contradicts this contention by pointing out (at Vol. 9, ¶ 204.12[1], pp. 949; 951) that timely[2] motions to reconsider function as motions

1. Petitioner's timely motion for reconsideration of the District Court's May 28, 1975, order giving petitioner no injunctive relief from fees called for in the agreements in suit and imposing additional obligations during pendency of the suit below was not wholly overruled, as respondent infers; that order was modified in part. See July 1, 1975, order on reconsideration, Petitioner's App. pp. A16-A17.

2. The timeliness of petitioner's motion, served Monday, June 9, 1975, for reconsideration of the district court's May 28, 1975, order has never been questioned—and could not be validly challenged—by respondent or either of the courts below or by respondent in this Court.

under Rule 59(e), F.R.C.P., and, consequently, the second paragraph of Rule 4(a), F.R.A.P., does not merely extend or toll the 30-day period for appeal, but starts the period anew when the court acts on the motion.

This Court Reaches Through Procedural Miscalculations to Substantial Questions

The objective of respondent in misstating the applicability of Federal Rule of Appellate Procedure Rule 4(a), in its entirety, to petitioner's notice of appeal to the appellate court below is manifestly to degrade this petition to one seeking an exercise of merely "administrative or managerial" powers, rather than judicial powers pursuant to *SS Mimosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

Where, as here, interlocutory lower court rulings may threaten the effectiveness of a private action as a vital means for enforcing the anti-trust law policy of the United States, certiorari may be granted to review and even reverse an erroneous interlocutory order of a district court and judgments of an appellate court below. See *Perma Life Mufflers, Inc., et al. v. International Parts Corp., et al.*, 392 U.S. 134, 135 (1968). By the same rationale, a thwarting of the policy of *Lear* to unmuzzle a licensee's challenge to patents licensed in the same agreements attacked under the anti-trust laws would not seem immune to review in this Court because of (i) an appellate court's (and a respondent's) miscalculations under Rule 4(a), F.R.A.P., or (ii) a district court's conclusion (Petitioner's App. pp. A12-A15; A17) that *Lear* is inapplicable to agreements which both license patents and lease machinery covered by the licensed patents.

Omission in Respondent's Statement of Case—Consequent Misconstruction of 28 U.S.C. 1292

At the outset of the "Statement of the Case" in respondent's opposing brief (p. 2) not only are petitioner's claims in its complaint, filed January 15, 1975, telescoped and stated out of order and context (as the full record will show), but the statement is silent as to the reliefs, including injunctive reliefs, sought in the complaint. However proper such condensation might normally be, respondent disregards and omits a specific prayer of the several prayers in the complaint for injunctive reliefs (§ I, ¶ 15, as the full record will show), namely, for a mandatory order establishing an interest-bearing escrow account for fees which would be payable under the license-lease agreements in suit if petitioner should wholly fail in its attacks upon the lawfulness of the agreements and the challenge to the patents licensed thereby. The pleaded purpose of such preliminary injunctive relief is to avoid substantiation of a claim of default by respondent or jeopardization of petitioner's continuation in business during the pendency of the action.

Respondent utilizes its omission, in support of the obvious substantive error by the appellate court below that it was presented with ". . . no final order from which an appeal could be perfected. . ." (Petition App. A3-A4), to contend now (Resp. Br. p. 6, n.1) that the appellate court below was not even presented with an interlocutorily appealable order under 28 U.S.C. 1292(a)(1). This contention calls for misconstruction of that statute (reproduced in the petition at p. 4) as excluding interlocutory appeals from denials of mandatory injunctive relief. Since Petitioner's motion of February 12, 1975, was the necessary enabling motion for the mandatory injunctive relief of an

escrow account as sought in the complaint, its eventual denial and the timely notice of appeal from an affirmation of such denial by the District Court pursuant to a timely motion under Rule 59(e), F.R.C.P. (Petition App. A19) presented the appellate court with a duly perfected interlocutory appeal as to which statutory jurisdiction was vested.

It is submitted that, respondent's contentions to the contrary notwithstanding, if any jurisdiction was lacking in the appellate court below, it was the absence of authority to avoid decision of the substantive issues of the statutory interlocutory appeal before it on the ground that the appeal was not from a "final order" and the notice of appeal "was not timely filed".

CONCLUSION

For the foregoing reasons, it is respectfully submitted under Rule 24(4) of this Court that the arguments first raised in respondent's brief in opposition to the petition are not merely untenable but emphasize the substantial public importance of the judicial questions raised by the actions of courts below and presented in this petition.

Respectfully submitted,

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